Supreme Court, U.S.
FILED

061487 APR 12 2007

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

PHILLIP VAN AELSTYN,
PETITIONER,

V.

THE STATE OF VERMONT,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF VERMONT

PETITION FOR WRIT OF CERTIORARI

JEFFREY A. DENNER
PAUL J. ANDREWS
Counsel of Record for Petitioner
DENNER PELLEGRINO, LLP
FOUR LONGFELLOW PLACE
BOSTON, MA 02114
(617) 227-8516

QUESTION PRESENTED

Whether a trial court needs to conduct an on the record inquiry of a defendant who seeks to waive his Constitutionally-protected right to counsel in order to determine if his waiver is knowing, intelligent and voluntary.

PARTIES TO THE PROCEEDING

Petitioner, who was the Defendant in the Supreme Court of Vermont, is Philip Van Aelstyn.

Respondent is the state of Vermont.

There are no corporate parties to this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

I. The Court Should Grant the Writ to Decide Whether a State Court Must Make an Inquiry on the Record as to Whether a Defendant has Made a Knowing, Intelligent and Voluntary Waiver of his Right to Counsel.....8

A. In *Faretta,* this Court required that a Defendant Make a Knowing and Intelligent Waiver of his right to Counsel.....9

B. There is a Split of Authority Over Whether a Knowing and Intelligent Waiver of Counsel Requires an Explicit Warning from the Court.....11

II. The Court Should Grant the Writ to Determine if the Vermont Supreme Court Decided the Question of Whether a Waiver of the Right to Counsel Occurred in a Way that Conflicts with Nearly Every United States Court of Appeals.....19

CONCLUSION.....21

TABLE OF AUTHORITIES

CASE LAW **PAGE**

Buhl v. Cooksey,
233 F.3d 783 (3rd Cir. 2000).....20

Dallio v. Spitzer,
343 F.3d 553 (2nd Cir. 2003).....12, 13, 18

Faretta v. California,
422 U.S. 806 (1975).....9, 10

Johnson v. Zervst,
304 U.S. 458 (1938).....9

Moreno v. Stewart,
171 F.3d 658 (9th Cir. 1999).....11, 12

Stano v. Dugger,
921 F.2d 1125 (11th Cir. 1991).....20

State v. Langley,
109 Idaho 119, 705 P.2d 1074 (Ct.App. 1985).....17

State v. Nichols,
207 S.W. 3d 215 (Mo.App. S.D. 2006) 17

State v. Worthy,
583 N.W. 2d 270 (Minn. 1998).....17

United States v. Bailey,
675 F.2d 1292 (D.C. Cir. 1982) 16

United States v. Bell,
901 F.2d 574 (7th Cir. 1990).....13

United States v. Cromer,
389 F.3d 662 (6th Cir. 2004).....16, 13, 20

United States v. Davis,
269 F.3d 514 (5th Cir. 2001).....12, 14

United States v. Hafen,
726 F.2d 21 (1st Cir. 1984).....13

United States v. Hughes,
191 F.3d 1317 (10th Cir. 1999).....14

United States v. McDowell,
814 F.2d 245 (6th Cir. 1987) 16

United States v. Peppers,
302 F.3d 120 (3rd Cir. 2002).....16

United States v. Singleton,
107 F.3d 1091 (4th Cir. 1997).....14

Williams v. Bartlett,
44 F.3d 95 (2nd Cir. 1994).....21

RULES

U.S. Sup.Ct.Rule 10.....9

REFERENCES

1 Bench Book for United States District Judges,
1.02-2 to -5 (3d ed. 1986) 15

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Philip van Aelstyn, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Vermont entered on January 12, 2007.

OPINION BELOW

The Supreme Court of Vermont issued its opinion on this case on January 12, 2007. A copy of that opinion is attached as Appendix A. The Court's opinion is published at 917 A.2d 471.

JURISDICTION

The Supreme Court of Vermont issued its decision in this case on January 12, 2007. A copy is attached as Appendix "A". The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Philip van Aelstyn ("the Petitioner"), a Vermont Attorney who had moved to California, was convicted of two counts of extortion and one count of stalking following a jury trial in the District Court, Unit 2, Chittenden County of Vermont. (App. A–1-2).

After his arraignment in February of 2004, Mr. van Aelstyn hired an attorney to represent him. On August of 2004, this attorney filed a motion to withdraw from Mr. van Aelstyn's case. Mr. van Aelstyn then filed a limited *pro se* Appearance to address counsel's request to withdraw. The court conducted a hearing on the motion and allowed counsel to withdraw even though Mr. van Aelstyn had expressed concern regarding the deadline for motions and discovery not being extended. (App. A-2).

The following month, in September of 2004, Mr. van Aelstyn hired a second attorney to represent him. In October of 2004, this second attorney filed a motion to withdraw from

his case. This motion was granted. Mr. van Aelstyn filed a Notice of Limited *pro se* Appearance to respond to the withdrawal motion and to move the court to continue a scheduled status conference. (App. A-2). Mr. van Aelstyn represented to the Court that he intended to retain counsel despite financial limitations. (App. A-2).

Mr. van Aelstyn filed a Notice of *Pro Se* Appearance on November 29, 2004 which was in response to the state's refusal to communicate with him until he entered such an appearance. (App. A-2). Nine days later, on December 7, 2004, Mr. van Aelstyn, telephoned the court to request a public defender application form. On December 10, 2004, Mr. van Aelstyn filed three additional motions including a motion to appoint a public defender. (App. A-3). In this motion, he identified his lack of counsel as an outstanding issue. (App. A-5). The Court denied Mr. van Aelstyn's request for a public defender noting only that, "Defendant has indicated his intent to proceed *pro se*." (App. A-3). On

December 15, 2004, Mr. van Aelstyn filed a motion to prevent bail forfeiture and again identified his lack of counsel as an outstanding issue. (App. A-6). The court did not find Mr. van Aelstyn's conduct so equivocal after entering his appearance to require a colloquy. (App. A-6-7).

On January 18, 2005, the court held the jury draw. At the jury draw Mr. van Aelstyn did not raise the issue of his representation. (App. A-7). Mr. van Aelstyn proceeded through the jury draw and then proceeded through the trial representing himself. Mr. van Aelstyn was never explicitly asked about his waiver on the record nor was he ever informed, on the record, of the risks of appearing *pro se*. The jury returned guilty findings on all counts. (App. A-4). Mr. van Aelstyn was convicted of two counts of extortion and one count of stalking and was sentenced on May 13, 2005. (App. A-2, 4).

Mr. van Aelstyn appealed to the Supreme Court of Vermont and argued that the district court failed to determine

whether he intended to waive his right to counsel before the case went to trial. (App. A-2). He argued that he was forced to proceed *pro se* without a valid waiver of his constitutional right to counsel. (App. A-4). In determining whether the waiver was made knowingly and voluntarily, the Supreme Court of Vermont examined the background, experience, and conduct of the accused and considered the facts that Mr. van Aelstyn had practiced law in both Vermont and California, with a focus on land transactions, had hired two attorneys, complained about their diligence and ability and sought a continuance to obtain a third attorney. (App. A-9). The Supreme Court of Vermont further reasoned that the pre-trial motions filed by Mr. van Aelstyn, both substantive and procedural, demonstrated an understanding of charges against him and the serious penalties in the events of a conviction. (App. A-9). The Supreme Court of Vermont held that his background, training and experience qualified him to make a choice that was with full knowledge of its consequences and

that his waiver was made knowingly and voluntarily (App. A-9-10). The Supreme Court of Vermont held that an inquiry into a defendant's waiver of counsel is not required when it is apparent that the defendant understands the right to counsel. (App. A-5). Based on this, in the state of Vermont a colloquy can be replaced by facts and circumstances to determine if the waiver was knowing and intelligent. The Supreme Court of Vermont explained that to proceed without a colloquy, the understanding and intent must be clear and it can not be justified by silence or other equivocal conduct. (App. A-5). While the Supreme Court of Vermont held in order to proceed without a colloquy, an understanding and intent must be clear however, the Court never set out any guidelines by which to determine the clarity of the defendant's understanding and intent. The Petitioner now seeks a writ of certiorari on the important issue presented in this case.

REASON FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER A STATE COURT MUST MAKE AN INQUIRY ON THE RECORD AS TO WHETHER A DEFENDANT HAS MADE A KNOWING, INTELLEGENT AND VOLUNTARY WIAVER OF HIS RIGHT TO COUNSEL

The Vermont Supreme Court held that, although it is "better practice" to hold an on the record colloquy as to whether a defendant has made a knowing and intelligent waiver of his right to counsel, such knowledge, nonetheless, can be inferred from the circumstances. (App. A-9-10). Such an approach is fraught with peril, however, particularly in cases such as this in which the record concerning the defendant's desire to proceed *pro se* is far from unambiguous. *See Section II, infra.* Moreover, there is a split among the Circuits as to whether such an on the record inquiry is constitutionally required or merely advisable. This perceived ambiguity also has resulted in a split among state

courts that have addressed this issue. This Court should grant certiorari because this important question of federal law is subject to an intractable split of authority in the lower courts, and has not been, but should be, resolved by this Court. U.S. Sup.Ct.Rule 10.

A. In *Faretta* This Court Required that a Defendant Make a Knowing and Intelligent Waiver of His Right to Counsel

In the landmark case of *Faretta v. California*, 422 U.S. 806 (1975), this Court found that, under the Sixth Amendment to the United States Constitution, a defendant has the right to self-representation. Since the right to counsel is guaranteed under the Sixth Amendment, any waiver of this right must be made 'knowingly and intelligently.' *Id.* At 835; *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938). In order to conclude that a defendant's waiver of counsel is knowing and intelligent, this Court counseled that a defendant, "*should* be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he

knows what he is doing and his choice is made with his eyes open.'" *Faretta* at 835; *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). (Emphasis added). The fact that this Court said that a defendant "should" be made aware of the dangers of self-representation has given rise to the question as to whether a defendant affirmatively must be made aware of such dangers by the court on the record, or whether a court can find that a defendant made a knowing and intelligent waiver based simply on the circumstances surrounding the defendant's conduct before and during trial. This Court should grant certiorari to resolve any ambiguity surrounding this important issue of constitutional law and hold that a knowing and intelligent waiver of the right to counsel requires an on the record inquiry and colloquy between the defendant and the court.

B. There is a Split of Authority Over Whether a Knowing and Intelligent Waiver of Counsel Requires an Explicit Warning from the Court

The *Faretta* decision produced a range of responses from the various Circuits that have addressed the issue. Even prior to this Court's decision in *Faretta*, the Ninth Circuit required district courts to make an affirmative finding that a defendant had made a knowing and intelligent waiver of his right to counsel. *Moreno v. Stewart*, 171 F.3d 658, 660-661 (9th Cir. 1999). Following *Faretta*, the Ninth Circuit repeatedly clarified that, "a district court should not grant a defendant's request to waive representation by counsel and serve as his own counsel, without discussing with the defendant in open court, whether the waiver was knowingly and intelligently made, with an understanding of the possible penalties, and the dangers of self-representation." *Moreno*, 171 F.3d at 661. Nonetheless, since this was only the preferred procedure that "should" be followed, the Ninth Circuit carved out a narrow exception for circumstances in

which "the record as a whole" indicated a knowing and intelligent waiver. Moreover, the Ninth Circuit refused to extend to the state courts the requirement that a court discuss with a defendant the danger of making such a waiver because it believed that such a procedure was not "constitutionally compelled" under *Faretta*. *Id.*

Similarly, the Second Circuit has found that *Faretta's* reference to what a court "should" do in making a waiver record was not controlling Supreme Court law but simply dictum. *Dallio v. Spitzer*, 343 F.3d 553, 563 (2nd Cir. 2003). Thus, warnings by the district court were simply a factor (albeit an important one) in determining if a waiver was knowing and intelligent, and could be considered as part of a "totality of the circumstances" analysis. *Id.* at 563. Inasmuch as it viewed such warnings as being part of the Court's dictum in *Faretta*, it refused to find that state courts were constitutionally required to conduct such inquiries. *Id.* at 564. Nonetheless, the Second Circuit noted it precedents on this

topic, "appeared to send mixed signals," to lower courts attempting to wrestle with the issue. *Id.* at 563-564.

Despite this very real risk of sending "mixed signals" to lower courts, several Circuits while expressing a clear preference for administering on the record *Faretta* warnings, nonetheless, have adopted a totality of the circumstances analysis to determine of a waiver of counsel was knowing and intelligent. *See, e.g. United States v. Bell*, 901 F.2d 574, 576-577 (7th Cir. 1990)(expressing "strong preference" for a formal waiver inquiry but finding no reversible error if totality of circumstances reveals a knowing and intelligent waiver); *United States v. Hafen*, 726 F.2d 21, 26 (1st Cir. 1984)("Although the practice of issuing specific warnings to defendants who wish to proceed *pro se* is a good way ...to ensure that the requirements of Faretta are met, it is not the *only* way.")(Emphasis in original); *See also, United States v. Hughes*, 191 F.3d 1317, 1323-1324 (10th Cir. 1999); *United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997).

The Fifth Circuit has "consistently required trial courts to provide *Faretta* warnings," but noted that it required "no sacrosanct litany for warning defendants against waving the right to counsel." *United States v. Davis*, 269 F.3d 514, 518-519 (5th Cir. 2001). Thus, although *some* warning is required, the exact nature and wording of the warning depend "on the circumstances of the individual case." *Id.* at 519.

The case at bar, perfectly illustrates the confusion caused by the majority approach of preferring explicit *Faretta* warnings while still accepting a totality of the circumstances analysis. The Vermont Supreme Court cited the *Harris* case from the Ninth Circuit is support of its use of a facts and circumstances analysis to determine if the defendant made a knowing and intelligent waiver of counsel. (App. A-8), *United States v. Harris*, 683 F.2d 322, 325 (9th Cir. 1982). Yet, in the same sentence, it also quoted the Fifth Circuit's admonition in *Davis* that "we [the Vermont

Supreme Court] 'require no sacrosanct litany for warning defendants against waiving the right to counsel.'" (App. A-8). In so doing, however, the Vermont Supreme Court ignored the Fifth Circuit's explicit requirement in *Davis* that some type of Faretta warning be given. *See* (App. A-8); *Davis* at 518-519. Thus, it would appear that the Second Circuit's fear of sending mixed signals to other courts by merely preferring a *Faretta* warning was prescient.

In contrast, the Sixth Circuit, seeking to eliminate the dangers posed by such ambiguity, and relying on its "supervisory powers," developed a "rather lengthy series of questions from 1 *Bench Book for United States District Judges* 1.02-2 to -5 (3d ed. 1986) that a district court should ask in order to ensure that a defendant's waiver of counsel is knowing and intelligent." *United States v. Cromer*, 389 F.3d 662, 680 (6th Cir. 2004); *United States v. McDowell*, 814 F.2d 245, 247, 250 (6th Cir. 1987). In order for such a waiver to be valid, "substantial compliance" with the series of

questions set forth is required. *Cromer* at 680. Similarly, the D.C Circuit has invoked its supervisory powers to require that a district court "mak[e] clear on the record" a defendant's awareness of "the dangers and disadvantages of self-representation." *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982). *See also, United States v. Peppers*, 302 F.3d 120, 133 (3rd Cir. 2002) (requiring the district court to make a "thorough inquiry, on the record, to assure itself that the defendant fully apprehends ... the perils of self-representation").

This split in the Circuits has produced a corresponding disparity among courts in the various states. Vermont, as we have seen, follows the totality of the circumstances analysis, in which *Faretta* warnings are only preferred by not required. Minnesota follows a similar approach, requiring a that a waiver of a defendant's right to counsel be made in writing, but refusing to find reversible error in the absence of a signed waiver if the facts and

circumstances surrounding the case make clear that the defendant's waiver was knowing and intelligent. *State v. Worthy*, 583 N.W. 2d 270, 276 (Minn. 1998).

On the other hand, many other states have adopted the more stringent standard that a *Faretta* warning be made on the record. Indeed, several of these states have codified the requirement that a defendant's waiver of counsel be made on the record, after a colloquy with the court, to determine if such a waiver is knowing and intelligent. *See, e.g. State v. Nichols*, 207 S.W. 3d 215, 224-225 (Mo.App. S.D. 2006) (analyzing RSMo. Section 600.051 that mandates at least six factors that must be explained to the defendant by the court to obtain a valid waiver.); *State v. Langley*, 109 Idaho 119, 122, 705 P.2d 1074, 1077 (Ct. App. 1985) (Explaining that Idaho Code §19-857 requires that a district court make a factual finding that the defendant is acting with full knowledge and awareness of the consequences of proceeding without counsel).

As is apparent from the foregoing, the split of authority on this issue is large and intractable. The issue of whether a court must make an on the record inquiry to determine if a defendant's waiver of counsel is knowing and intelligent, or whether they merely "should" make such an inquiry is a question of constitutional law, directly implicating a defendant's rights under the Sixth and Fourteenth Amendments. This split has had a debilitating effect not only on those state courts, such as the Vermont Supreme Court, that turn to the federal courts for guidance, but also for those state prisoners seeking relief under a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See, e.g. Dallio v. Spitzer*, 343 F.3d at 564-565 (holding that, because Faretta does not compel that specific warnings be given to a defendant seeking a waiver, the failure of a state court to give such warnings does not entitle him to habeas relief); *Moreno v. Stewart* 171 F.3d at 661 (same). The only way for the split of authority on this important issue to be resolved is for this

Court to resolve it. Thus, this Court thus should accept certiorari over this case to resolve the split of lower-court authority on this important issue.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE IF THE VERMONT SUPREME COURT DECIDED THE QUESTION OF WETHER A WAIVER OF THE RIGHT TO COUNSEL OCCURRED IN A WAY THAT CONFLICTS WITH NEARLY EVERY UNITED STATES COURTS OF APPEAL

A. The Decision of the Vermont Supreme Court is in Conflict with Most, if Not All United States Courts of Appeal

While the various Circuit Courts may be split concerning the need to conduct an on the record examination of the defendant to establish if his waiver of counsel is knowing and intelligent, they are united in one key point – a defendant's desire to proceed *pro se* must be clearly and unambiguously stated on the record. Because the right to counsel is a fundamental right granted by the Sixth Amendment, courts are loathe to allow it to be waived absent a clear and unambiguous request. This is a basic threshold

from which all other analysis must necessarily flow. *See Cromer*, 389 F.3d at 680-681 (collecting cases); *Buhl v. Cooksey*, 233 F.3d 783, 790 (3rd Cir. 2000)("In order to overcome this presumption [against waiver of counsel], and conduct his/her own defense, a defendant must clearly and unequivocally ask to proceed *pro se*."); *Stano v. Dugger*, 921 F.2d 1125, 1144 (11th Cir. 1991)("There is simply no precedent in this Circuit for proceeding *pro se* by constructive notice without an obvious assertion of the right of self-representation."

The Vermont Supreme Court went exactly against this overwhelming body of federal law in finding that the defendant intended to proceed pro se, based not on a clear and unambiguous statement that he wished to do so, but rather on the Vermont Supreme Court's post-trial analysis of the "totality of the defendant's conduct." (App. A-9-10). By the Vermont Supreme Court's own admission, the defendant made "subsequent, but incomplete" requests for a public

defender prior to trial. Allowing the Vermont Supreme Court to engage in such post-trial, subjective parsing of the record in order to find a waiver of a Constitutional right is impermissible. This Court should grant certiorari to overturn the decision of the Vermont Supreme Court as contrary to clearly established holdings of the United States Courts of Appeals, including, but not limited to, that of the Second Circuit. *See Williams v. Bartlett*, 44 F.3d 95, 100 (2nd Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Jeffrey A. Denner

Jeffrey A. Denner
Paul J. Andrews
Denner Pellegrino, LLP
Four Longfellow Place
Boston, MA 02114
Counsel of Record
Attorneys for Petitioner

54

(2)

Supreme Court, U.S.
FILED

061487 APR 12 2007

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

Phillip van Aelstyn,
Petitioner,

v.

The State of Vermont,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF VERMONT

APPENDIX

Jeffrey A. Denner
Paul J. Andrews
Denner Pellegrino, LLP
Four Longfellow Place
Boston, MA 02114
Counsel of Record
Attorneys for Petitioner

APPENDIX "A"

State v. van Aelstyn (2005-220)

2007 VT 6

[Filed 12-Jan-2007]

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

2007 VT 6

No. 2005-220

State of Vermont	Supreme Court
v.	On Appeal from District Court of Vermont, Unit No. 2, Chittenden Circuit
Philip van Aelstyn	February Term, 2006

Michael S. Kupersmith, J.

William H. Sorrell, Attorney General, and John Treadwell, Assistant Attorney General, Montpelier, for Plaintiff-Appellee.

Mark E. Furlan of Abatiell Associates, P.C., Rutland, and Jeffrey A. Denner and Gary G. Pelletier of Denner Associates, PC, Boston, Massachusetts, for Defendant-Appellant.

BEST AVAILABLE COPY

PRESENT: Reiber, C.J., Dooley, Johnson, Skoglund and Burgess, JJ.

¶ 1. BURGESS, J. Defendant challenges his convictions on two counts of extortion and one count of stalking following a jury trial. Defendant argues that he is entitled to a new trial because: (1) the district court failed to determine whether defendant intended to waive his right to counsel before the case went to trial, and (2) a post-conviction amendment to the stalking statute should be applied retroactively. We affirm.

¶ 2. Defendant, a licensed Vermont attorney who moved to California, had difficulty retaining counsel to represent him after his arraignment in February 2004 on two counts of extortion, 13 V.S.A. § 1701, and one count of stalking, 13 V.S.A. § 1062. In late August 2004,defendant's original attorney moved to withdraw. Defendant filed a notice of limited pro se appearance to address his counsel's request to withdraw. At a hearing on the motion, the court allowed counsel to withdraw despite defendant's expressed concern that the deadline for motions and discovery was not being extended and that he did not have funds to hire other counsel. Defendant nevertheless indicated that he would attempt to retain counsel and would keep the court informed of his situation.

¶ 3. Defendant hired a second attorney in late September. That attorney moved for and was granted leave to withdraw at the end of October. Defendant again filed a notice of limited pro se appearance to respond to the withdrawal motion and to move to continue a scheduled status conference. Again, defendant represented to the court that he intended to retain counsel despite financial limitations. Defendant did not retain other counsel, however, but instead filed a general notice of pro se appearance on November 29, apparently in response to the State's refusal to communicate directly with him until he entered such an appearance.

¶ 4. On December 7, defendant called the court to request a public defender application form, which was mailed to him. On December 10, defendant filed three motions: (1) a motion to appoint a public defender; (2) a Rule 12(d) motion to dismiss; and (3) a motion to continue the scheduled December 13 jury draw. Defendant's request for appointed counsel did not include a public defender application form or otherwise disclose the financial information required for assignment of counsel by the court. See 13 V.S.A. § 5236 (providing for assignment of public defender based upon determination of financial need); A.O. 4, § 5(determination of financial need "shall take place following the completion of the Application for Public Defender Services form"). The court denied defendant's public defender request, noting only that "Defendant has indicated his intent to proceed pro se." The court also denied the motion to continue the jury draw.

¶ 5. When defendant failed to appear for the draw, an arrest warrant was issued and a bail forfeiture hearing scheduled. Defendant then moved to strike the arrest warrant and stop bail forfeiture, contending that he did not believe the jury draw would take place because of many outstanding issues in the case, including appointment of a public defender. At the bail forfeiture hearing, defendant again noted the financial toll the case was taking on him, but the hearing concluded with the parties agreeing to appear at the next jury draw on January 18, 2005.

¶ 6. At the jury draw, the court asked defendant if he wished to be introduced to the prospective jurors as an attorney representing himself. Defendant agreed to this introduction, and the court stated:

> The first matter before the court this morning is State v. Philip van Aelstyn. Mr. van Aelstyn is present and is representing himself. He, it happens that he is an attorney, but he is representing himself, which he's entitled to do. Of course, attorneys are

also entitled to have attorneys, but he is representing himself today.

Defendant made no objection to the statement and proceeded through jury draw and trial without counsel. On the third day of trial, the jury returned guilty verdicts on all counts. Defendant was sentenced on May 13, 2005. Coincidentally, the stalking statute under which defendant was found guilty in January and sentenced in May 2005, was amended effective July 1, 2005. 2005, No. 83, § 4 (amending definition of "stalk" in 13 V.S.A. § 1061); 1 V.S.A. § 212 (providing that laws take effect on July 1 following enactment unless otherwise provided).

I.

¶ 7. Defendant argues that he was forced to proceed pro se without making a valid waiver of his constitutional right to counsel. Defendant does not argue that he was a needy person or that any of his rights under the Public Defender Act (FN1) were violated when the trial court summarily denied his motion to appoint counsel. For that reason, we do not address the language or merits of the trial court's denial of defendant's motion to appoint a public defender. Rather, we confine our inquiry to defendant's argument that his motion to appoint counsel was one of numerous expressions of his desire for representation that were ignored by the trial court-forcing him to proceed to trial pro se without making a knowing and voluntary waiver of his right to counsel.

¶ 8. The United States and Vermont constitutions provide that a criminal defendant has a right to legal counsel. U.S. Const. amend. VI; Vt. Const. ch. I, art. 10. Valid waiver of this right must be voluntary, knowing, and intelligent. State v. Brown, 2005 VT 104, ¶¶ 21-23, 179 Vt. 22, 890 A.2d 79; State v. Stenson, 169 Vt. 590, 592, 738 A.2d 567,570-71 (1999) (mem.). In determining whether these criteria were met, we consider the totality of circumstances including the

"background, experience, and conduct of the accused." State v. Ahearn, 137 Vt. 253, 260-61, 403 A.2d 696, 701-02 (1979). Valid waiver often "requires the trial court to conduct an inquiry into the nature of a defendant's understanding of the rights he is waiving. . . . and provide a clear explanation of the adverse consequences of pro se representation." Stenson, 169 Vt. at 592, 738 A.2d at 571 (quotations omitted). However, this inquiry is not required when it is apparent that the defendant understands his right to counsel. Id. (finding valid waiver when defendant "demonstrated that he knew he had a right to counsel and he expressed his desire to be represented by an attorney, but was unwilling to pay for it");see State v. Merrill, 155 Vt. 422, 426, 584 A.2d 1129, 1131-32 (1990)(stating that "specific circumstances, such as a defendant's past experience in representing himself, or pretrial attempts to obtain or to fire counsel . . . may reveal that in-depth inquiry or extensive advice is not necessary"). But the understanding and intent to waive counsel must be clear; the absence of a colloquy may not be justified solely by a defendant's silence or other equivocal conduct. State v. Tribble, 2005 VT 132, ¶¶ 27-28, 179 Vt. 235, 892 A.2d 232 (finding no valid waiver where there was no colloquy and defendant continued to insist that he have court-appointed counsel as late as the day that the trial was scheduled to begin).

A. Voluntary Waiver

¶ 9. Defendant first contends that his waiver of counsel was involuntary. Defendant's argument is premised on the trial court having allowed two privately hired attorneys to withdraw from his case and ignoring his repeated assertions that he wanted an attorney to represent him at trial. Defendant, however, acquiesced to both attorneys' withdrawals. When his first attorney moved to withdraw in August 2004, defendant expressed concern about upcoming deadlines but also stated that he lacked faith in his attorney's abilities and wanted a refund of the fees he paid her. When

defendant's second attorney moved to withdraw in October, defendant stated in his response that he "respectfully object[ed]" to his attorney's withdrawal, but would consent if he was "afforded a reasonable amount of time to locate and engage replacement counsel." Defendant requested ninety days to accomplish that task, but was afforded forty-nine days. The motion to withdraw was granted October 25, and on November 1, the trial court granted defendant's motion to continue the status conference scheduled for the following day. Jury draw was set for December 13. (FN2) Jury draw was rescheduled for January after defendant failed to appear for the December draw. In all, defendant had eighty-five days from the time of his second attorney's withdrawal in October to the January jury draw to hire counsel or file a public defender application, if he desired. (FN3) Given the elapsed time, the trial court's granting of the motions for withdrawal did not force defendant to go to trial pro se.

¶10. The voluntariness of defendant's waiver is further supported by the notice of general pro se appearance he filed on November 29. Defendant's first two notices of pro se appearance articulated specific limits on his appearance, expressly stating in the second notice that he did not intend to waive his right to counsel. Defendant's third notice of appearance included no such limit to his appearance or reservation of his right to counsel. Defendant simply stated that he was entering his appearance pro se and requested that copies of all filings be sent to him. The absence of any limitation in the November 29 notice, particularly when defendant had placed limitations in the two previous notices of appearance, reflects a voluntary intent to proceed pro se.

¶ 11. Defendant cites his December 10 motion to appoint counsel and his December 16 motion to prevent bail forfeiture-when defendant identified his lack of counsel as an outstanding issue-as instances when he signaled to the court that he did not wish to proceed pro se. We do not find defendant's conduct after entering his general pro se

appearance so equivocal that a colloquy was required. Cf. Tribble, 2005 VT 132, ¶ 28 (finding no valid waiver where there was no colloquy and defendant continued to insist that he have court-appointed counsel as late as the day that the trial was scheduled to begin). During this time, defendant continued to file motions on his own behalf that indicated a continued intent to self-representation, including a "Motion to Dismiss for Lack of Prima Facie Case." Though defendant's motion to dismiss stated he was appearing pro se for "the time being" in order to file the motion, defendant's request for, and subsequent references to, a public defender focused only on his unsupported assertions of financial difficulties (FN4) and allegations against his hired attorneys.

¶ 12. At the bail forfeiture hearing on January 3, 2005, for example, defendant noted the difficulty of repeatedly traveling coast to coast to appear for hearings and stated "this matter is draining me financially. That's why I asked for representation." Then, at the close of the hearing, a discussion was had regarding what, if any, issues were outstanding. The State's attorney listed some evidentiary issues defendant had raised but stated they could be taken care of at the time of the jury draw. The State's attorney then stated that he thought nothing else remained "unless [defendant] had something else to bring up." Defendant replied "I don't, your honor," and agreed with the State's assessment. Despite claims of financial hardship, defendant never actually applied for public defender services. Further, at the jury draw, defendant did not raise the issue of his representation, but instead approved the court's comment to the jury that he was an attorney representing himself. Based on the totality of defendant's conduct, we conclude that his notice of general pro se appearance was not negated by his subsequent, but incomplete, request for a public defender, or his other statements of reservation to the court, and that defendant was not, in his words, "forced to waive" his right to counsel. After having eighty-five days to secure

representation, and failing to apply for the public defender, defendant simply showed up for jury draw without a lawyer.

B. Knowing and Intelligent Waiver

¶ 13. We next consider the totality of circumstances to determine whether defendant's waiver of counsel was made knowingly and intelligently. The fact that defendant is a lawyer may be considered in evaluating the effectiveness of his waiver but is not conclusive. Glasser v. United States, 315 U.S. 60, 70 (1942), superseded on other grounds by statute as recognized in Bourjaily v. United States, 483 U.S. 171, 177-78 (1987). Well-versed in the law or not, every defendant must "knowingly accept[] the risk" of proceeding pro se. Merrill, 155 Vt. at 425, 584 A.2d at 1131. For this reason, we have stated that when a defendant chooses to proceed without counsel, "the better practice is for the trial court first to conduct sufficient inquiry into the defendant's experience, motives, and understanding of what he is undertaking . . . and then to provide a clear explanation of the adverse consequences of pro se representation." Id. However, like the majority of jurisdictions we " 'require no sacrosanct litany for warning defendants against waiving the right to counsel' as 'the appropriate inquiry is what the defendant understood-not what the court said.' " 3 N. Hollander et al., Wharton's Criminal Procedure § 15:23, at 15-125 to 15-126 (14th ed. 2006) (quoting United States v. Davis, 269 F.3d 514, 519 (5th Cir. 2001); United States v. Harris, 683 F.2d 322, 325 (9th Cir. 1982)). We have found knowing and intelligent waivers when there was little or none of the suggested colloquy but circumstances nevertheless indicated that the waiver was knowing and intelligent. See, e.g., Stenson,169 Vt. at 592, 738 A.2d at 571 (finding valid waiver when there was limited colloquy, defendant twice applied for a public defender and defendant successfully hired private counsel who later withdrew); State v. Lewis, 156 Vt. 653, 654, 586 A.2d 550, 551-52 (1990) (mem.) (finding valid waiver when there was no colloquy based on defendant's apparent knowledge of the

charges and possible penalties and signing a waiver of counsel form).

¶ 14. In determining whether a waiver of counsel was knowing and intelligent, we examine the background, experience, and conduct of the accused. Merrill, 155 Vt. at 426, 584 A.2d at 1131-32; Ahearn, 137 Vt. at 260-61, 403 A.2d at 701-02. Defendant was forty years old at the time of trial and seven years out of law school. He worked as an attorney, with a focus on land transactions, in Vermont from 1998 until 2001 when he moved to California. Defendant joined the California bar and practiced with several firms there from 2001 to 2004. Defendant's background indicates a level of intelligence and legal sophistication from which we can reasonably infer his knowledge of the right and importance of having counsel. This conclusion is supported by defendant's pretrial conduct.

¶ 15. When conducting a waiver-of-counsel colloquy, the court advises the defendant that an attorney would better understand the applicable substantive law and procedural rules and might identify issues in the case that could otherwise be overlooked. See Tribble, 2005 VT 132, ¶ 26 (noting that in conducting a colloquy, court should "provide a clear explanation of the adverse consequences of pro se representation" (quotations omitted)). It is evident that defendant appreciated these values of legal representation when he hired two attorneys complained about their lack of diligence and ability, and sought a continuance to secure a third. Defendant also expressly understood that assigned counsel could be requested. Defendant's pretrial motions, both substantive and procedural, demonstrate an understanding of the charges against him and the serious penalties in the event of conviction. We can infer from defendant's actions, as well as his training and experience, that he was aware of the evidentiary and procedural rules applicable to trials, and the challenges they can present to litigants, and that he understood that another lawyer's perspective would be helpful in his defense. Thus, although

defendant may not have been well-qualified to handle the task of criminal defense that he chose to undertake, he was eminently qualified by his background, training, and experience to make that choice with full knowledge of its consequences.

¶ 16. On appeal, defendant points to numerous errors and gaffes in his self-representation to suggest that his waiver was not truly knowing. But defendant's own acknowledgment that he was not experienced enough to provide adequate self-representation, either before or after trial, does not invalidate his deliberate choice to proceed pro se. See Wiesner v. Abrams, 726 F. Supp 912, 918 E.D.N.Y. 1989) (holding that "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires if he makes the choice 'with eyes open' "); Lewis, 156 Vt. at 655, 586 A.2d at 552 (finding that right to self-representation is "constitutionally guaranteed even though [defendant] may conduct his own defense ultimately to his own detriment" (quotations omitted)).

II.

¶ 17. Defendant argues that a post-conviction amendment to Vermont's stalking statute mandates that he receive a new trial. Defendant was found guilty of stalking in violation of 13 V.S.A. § 1062 in January 2005 and was sentenced in March 2005. In July 2005, 13 V.S.A. § 1061 was amended: the definition of "stalk," which had prohibited conduct that "causes the person to fear for his or her physical safety," a subjective test, was redefined to include only conduct that "would cause a reasonable person to fear for his or her physical safety," an objective test. 2005, No. 83, § 4 (emphasis added). The jury was instructed on the definition of "stalk" contained in § 1061 as it existed at the time of the offense and trial-with the subjective standard for fear. Defendant initially argued on appeal that the common law

rule of retroactivity mandated that he receive a new trial, relying on language from State v. Brown that "a change in the law will be given effect while a case is on direct review." 165 Vt. 79, 83, 676 A.2d 350, 352 (1996) (quotations omitted). However, as the State pointed out, Brown was referring to changes brought about by judicial decision. The retroactive effect of statutory amendments is provided for by statute:

> The amendment or repeal of an act or statutory provision, except as provided in subsection (c) of this section [relating to punishment], shall not:
>
> . . . .
>
> (3) Affect any violation of the act or provision amended or
> repealed, or any penalty or forfeiture incurred thereunder, prior to the effective date of the amendment or repeal . . . .

1 V.S.A. § 214(b).

¶ 18. Accordingly, in his reply brief, defendant advances a different argument: that the amendments were "clarifying," not substantive, and thus have a retroactive effect. Defendant's citation to United States v. Goines, 357 F.3d 469 (4th Cir. 2004), is unpersuasive on this point. Goines construed an amendment to the federal sentencing guidelines, a document that specifically provided for the retroactive effect of clarifying amendments. Id. at 474 (citing U.S.S.G. § 1B1.11(b)(2)). The other case cited by defendant, Murray v. Mattison, 63 Vt. 479, 479, 21 A. 532, 532 (1891), stands for the proposition that amendments addressing "practice and procedure only" have retroactive effect. There is no basis for considering the amendment at issue to be procedural, and Murray is thus inapposite. Aside from defendant's mere assertion that clarifying amendments are procedural per se, this suggested exception to § 214(b) is

unsupported by our statutes or case law and we decline to adopt it.

Affirmed.

FOR THE COURT:

_____

Associate Justice

Footnotes

FN1. A needy person charged with a serious crime has the right to "be represented by an attorney to the same extent as a person having his own counsel." 13 V.S.A § 5231.

FN2. After the second motion to withdraw was granted, defendant filed an "Objection to Granting Leave to Withdraw without Hearing; Request for Court Order Requiring the State to Communicate with Defendant; and Request for Clarification Regarding Schedule." In that motion, defendant stated that he objected to the court granting a motion to withdraw without hearing and requested his objection be noted on the record. We find defendant's subsequent objection irrelevant to the present discussion because his objection was not that his attorney was allowed to withdraw, but that she was allowed to withdraw without a hearing. In any event, defendant acceded to withdrawal, provided he had a reasonable opportunity to secure replacement counsel.

FN3. Defendant made no showing, to the trial court or on appeal, that the forty-nine days initially allowed, or the eighty-five days that actually passed between withdrawal of

the second counsel and jury draw, were unreasonable time frames within which to secure representation.

FN4. On this point, we note that defendant made similar statements of financial difficulty when his first attorney moved to withdraw, but nevertheless hired a second attorney.